(3)

No. 88-32

In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is the *Morash* decision, which addresses ERISA's application to an employee benefit plan dealing with pay upon termination for accrued, unused vacation time, factually distinguishable or in legal conflict with other court decisions dealing with ERISA preemption of state vacation pay claims?

(2) Is there any conflict between the *Morash* decision, that found that ERISA preempts a Massachusetts statute to the extent that it requires employer compliance with employer-sponsored vacation pay plans, and this Court's *Fort Halifax* decision, that found that ERISA does not preempt a Maine statute because it requires that employers make one-time severance payments in the case of plant-closings and therefore does not implicate employer-sponsored severance plans?

(3) Is there confusion among the lower courts about which state laws are "generally applicable criminal laws" excepted from ERISA's preemptive coverage?

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BRIEF IN OPPOSITION

Respondent Richard N. Morash ("Morash") hereby opposes the issuance of a writ of certiorari to review the instant ruling of the Supreme Judicial Court of the Commonwealth of Massachusetts.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Since the Commonwealth has set forth the relevant provisions of law in its Petition, Respondent shall not re-state them in full. For convenience, however, Respondent re-states the most essential portions:

ERISA:

29 U.S.C. § 1144(a). Effect on Other Laws:

> . . . the provisions of this title . . . *shall supercede* any and all state laws insofar as they may now or hereafter *relate to any employee benefit plan* . . . (emphasis added)

29 U.S.C. § 1002. Definitions:

> For purposes of this subchapter:
>
> (1) The terms *"employee welfare benefit plan"* and "welfare plan" mean any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . *vacation benefits* . . . (emphasis added)

Department of Labor Regulation:

29 C.F.R. § 2510.3-1(b)(1987):

> (b) *Payroll practices.*
>
> . . . the terms *"employee welfare benefit plan"* and "welfare plan" *shall not include*—
>
> . . .
>
> (3) Payment of compensation, out of the employer's general assets, *on account of periods of time during which the employee,* although physically and mentally able to perform his or her duties and not absent for medical reasons . . . *performs no duties;* for example—
>
> (i) Payment of compensation *while an employee is on vacation* or absent on a holiday . . . (emphasis added)

Massachusetts Nonpayment of Wages Statute:

General Laws Chapter 149, § 148 (1982):

> . . . The word "wages" shall include any holiday or *vacation payments* due an employee *under an oral or written agreement.* (emphasis added)

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STATEMENT OF THE CASE

The facts and developments in this case are simple and limited. Respondent was President of a bank that terminated the employment of two vice-presidents. Upon termination, the vice-presidents claimed the bank had agreed to reimburse them for 66 and 42 unused vacation days, respectively, which amounted to payments of approximately $14,500 and $11,000. (R. 15) The bank took issue with the amount of such claims; and the vice-presidents filed claims with the Massachusetts Department of Labor and Industries (hereinafter the "Commonwealth") under the Massachusetts Nonpayment of Wages Statute, G.L. c.149, § 148 (the "Wages Statute").[1] (R. 3, 4, 16) The vacation pay claims fell within the ambit of the Wages Statute because it states that the word "wages" includes "va-

1. Each vice-president also filed a civil action soon after filing a claim with the Commonwealth, and each Complaint includes an ERISA count claiming these same vacation benefits.

cation payments due an employee *under an oral or written agreement.*'' (R. 16) As a result of the vice-presidents' claims that an agreement existed, the Commonwealth initiated criminal proceedings against Morash. (R. 15)

Morash moved to dismiss the complaints on the ground that ERISA preempts application of the Wages Statute to oral and written agreements dealing with payment at termination for accrued, unused vacation time. (R. 5-8) Because of the import of the issue presented by the motion, the parties suggested to the trial court that it report the question of law to the Massachusetts Court of Appeals.[2] (R. 10, 11) To report the question of law, the parties stipulated that

> the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time.

(R. 16)

The question reported was whether ERISA precludes prosecution of an employer for not "compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement." (R. 12-13) The Massachusetts Supreme Judicial Court answered the question by finding that the agreement to which the parties stipulated was a plan and that, since an "employee benefit plan" was involved, prosecution under the Massachusetts Wages Statute was preempted. (Pet. at A-6, 7)

The Commonwealth implies in its Petition that the *Morash* decision holds that ERISA preempts *all* state

2. Recognizing that the issue was likely to reach it eventually anyway, the Massachusetts Supreme Judicial Court accepted the case *sua sponte* for its direct review.

wages statutes and their application to *all* sorts of vacation payments, including payments for vacation time taken during employment. (Pet. at 11, 12, 22) Clearly, however, the issue that was before the Supreme Judicial Court was not that broad. Nor, therefore, did the *Morash* court address that issue.[3] The *Morash* decision's holding is simple and narrow. If an employer provides a particular lump-sum vacation benefit to its employees pursuant to an employee benefit plan, it is ERISA rather than the Massachusetts Wages Statute that ensures an employer's compliance with its plan.

—o—

ARGUMENT

I. BECAUSE THOSE DECISIONS THAT PETITIONER CLAIMS CONFLICT WITH MORASH ARE FACTUALLY DISTINGUISHABLE AND LEGALLY CONSISTENT, THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE.

A. The Vacation Benefits In The Cases Cited by Petitioner Are Factually Distinguishable.

Petitioner contends that because the *Morash* court and the Courts of Appeal for the Fourth and Sixth Circuits have held that ERISA preempts certain state law claims

3. The court stated the limits of its holding clearly: "[T]he statute *as applied* represents an attempt by the State to enforce the provisions of the plan . . . The fact that [the Wages Statute] also applies to wages and agreed-upon benefits that may *not* arise under an 'employee benefit plan' is irrelevant to the 'relate to' analysis, which focuses on the effect of the statute as applied in a particular case." (emphasis added) (Pet. at A-23)

regarding vacation benefits, while the Courts of Appeal for the Second and Ninth Circuits have found that ERISA does not preempt other state claims, there is a legal conflict that requires resolution by this Court.[4] Respondent replies that whether ERISA preempts a particular vacation benefit claim depends upon each case's facts. Because the preemption decisions in the cited cases stem from different facts, the cases do not conflict.

In fact, the legal principles that the courts have applied have been consistent: (1) ERISA preempts state laws that relate to employee benefit plans, 29 U.S.C. § 1144 (a), (2) vacation benefits are among the benefits that employee benefit plans may provide, 29 U.S.C. § 1002(1), and (3) although ERISA applies to vacation benefit compensation paid pursuant to employee benefit plans, it does not extend to vacation benefits that are wage compensation paid pursuant to payroll practices, 29 C.F.R. § 2510.3-1(b).

Therefore, whether ERISA preempts a particular vacation benefits claim depends on a factual analysis of whether the employer provides those benefits as a routine payroll practice, or provides those benefits as compensation pursuant to a plan. The differences among preemption determinations have stemmed from whether a court has found that the facts before it constituted an employee benefit plan, not from application of different legal principles.

4. There is some ambiguity in the Commonwealth's Petition. The Commonwealth has stated that the cases finding preemption "held that ERISA preempts *state laws pertaining to vacation payments to employees.*" (Pet. at 11) Upon first reading, therefore, the Commonwealth seems to claim that whereas some courts have held that ERISA preempts all state laws regarding vacation, others have held the opposite. In fact, however, in each case the court ruled that ERISA preempts *certain* claims, not that ERISA generally preempts any and all state laws pertaining to vacation payments. See discussion, *infra*, pp. 5-11.

Petitioner has cited three cases holding that ERISA preempted certain vacation pay claims, *Commonwealth v. Morash,* 402 Mass. 287, 522 N.E.2d 409 (1988); *Blakeman v. Mead Containers,* 779 F.2d 1146 (6th Cir. 1985); and *Holland v. National Steel Corp.,* 791 F.2d 1132 (4th Cir. 1986). In each of those cases, the determinative factor was that the particular vacation benefits at issue arose from or constituted an employee benefit plan.

For example, in *Morash,* the vacation benefits at issue were *not,* as the Commonwealth implies, *all* "agreed-upon vacation payments." (Pet. at 11) The only vacation benefits *Morash* addressed were an employer's agreement to permit its employees to bank their unused vacation time until severance of the employment relationship, at which time they might cash-in their saved time at their current wage-rates. (Pet. at A-8, 9) The court ruled that ERISA preempted the vacation claims because the facts established an employee benefit plan and the Wages Statute as applied related to that plan. (Pet. at A-20, 23) Although Petitioner often refers to vacation payments generally, which might include claims for isolated vacation days taken in the course of employment or for benefits absent a plan, *Morash* addressed only reimbursement for accrued, unused vacation payments under a plan. *See supra* n. 3.

Similarly, the vacation benefits in *Blakeman* were provided by a plan. The *Blakeman* plaintiffs alleged that their employer had a written vacation pay plan for all salaried employees. *Blakeman v. Mead Containers,* 779 F.2d 1146, 1148 (6th Cir. 1985). Consequently, the court found there was "little doubt that plaintiffs [were] both participants and beneficiaries and that the vacation provisions [were] employee welfare benefit plans." *Id.* at 1149. Having made the factual determination that entitlement to the vacation benefits arose from an employee benefit plan, the court held that ERISA applied. *Id.* at 1151.

The vacation benefits in *Holland* also stemmed from a plan. The plaintiff in *Holland* alleged she was entitled to vacation payments because her employer had an extended vacation plan that provided two weeks of additional vacation to long-term employees and payment for unused extended vacation time to terminated employees. *Holland v. National Steel Corp.,* 791 F.2d 1132, 1134 (4th Cir. 1986). The district court held that ERISA preempted plaintiff's contract claim for those benefits "because such benefits are part of an employee welfare benefit plan." *Id.* at 1135. The Court of Appeals for the Fourth Circuit held that the meaning of § 1002(1) defining employee welfare benefit plans is "quite plain" and does not exempt plaintiff's employer's vacation plan. *Id.*

In contrast, the cases that Petitioner claims clash with *Morash* involve vacation payments that are factually distinguishable. In *Shea v. Wells Fargo Armored Services Corp.,* 810 F.2d 372, 374 (2d Cir. 1987), employees claimed that

> [i]n lieu of using vacation time during the year in which it was earned, employees were allowed either to carry all or some of it over to the following year, or with the employer's approval, the employee could forego all or some vacation and be paid for it.

In *Shea,* therefore, the vacation benefit was an entitlement either to take vacation time or to take payment in lieu of the time *throughout the course of employment,* as opposed to reimbursement upon termination. The issue before the Court of Appeals was the district court's determination that the employer's provisions for vacation wages did not "establish an employee welfare benefit plan subject to ERISA coverage." *Id.* at 375. In resolving the issue, the court recognized that certain enumerated payroll practices are excluded from classification as employee welfare benefit plans and found that "the wages in question are payroll practices excluded from ERISA coverage." *Id.* at 376. Moreover, the court noted,

> The vacation pay available . . . was not contingent upon termination of employment or severance; to the contrary, accumulated vacation wages were payable whether or not employment continued.

Id. at 377. Based on its determination that the vacation payment facts presented a payroll practice rather than an employee benefit plan, the court found that ERISA did not apply. *Id.* at 378.

Similarly, in *California Hospital Ass'n v. Henning,* 770 F.2d 856 (9th Cir. 1985), *cert. denied,* 477 U.S. 904 (1986) (*"Henning"*), the court found that certain vacation payments were exempt from ERISA's coverage because they did not arise from a plan. The benefits at issue in *Henning* arose from section 227.3 of the California

Labor Code and the California Supreme Court's 1982 interpretation of that statute in *Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 774, 183 Cal. Rptr. 846, 647 P.2d 122 (1982). In *Suastez*, the court ruled that under the California Wages Statute, employees' vacation entitlements vest as labor is rendered, and that employers must pay terminating employees pro rata shares of such benefits as wages. 31 Cal. 3d at 784, 183 Cal. Rptr. at 852, 647 P.2d at 128. As a result of the *Suastez* ruling, some California employers adopted policies forbidding payment of prorated vacation pay and prescribing certain forfeitures of vacation time. 770 F.2d at 858. Unlike other vacation pay cases that arose from employees' efforts to enforce employers' promises to grant certain vacation benefits, *Henning* arose from the employers' challenge to state-required vacation payments. *Id.*

Petitioner has relied heavily upon the *Henning* decision before both the Massachusetts Supreme Judicial Court and this Court. Yet, *Morash* and *Henning* do not conflict. In *Morash*, the court found that the bank's agreement to provide certain vacation benefits was an employee benefit plan. Since ERISA unquestionably preempts state laws relating to employee benefit plans, the court held that ERISA preempted application of Massachusetts law to the *Morash* plan. Whereas *Morash* involved enforcement of a private vacation benefits plan, *Henning* involved state-mandated vacation payments, rather than an employee benefit plan.[5] Consistent with

5. The *Henning* facts are actually more analogous to those in this Court's *Fort Halifax* decision, 107 S.Ct. 211 (1987), than

(Continued on following page)

the principles of *Morash*, the court ruled that ERISA did not preempt California law.[6]

Whether ERISA preempts a particular state law claim addressing vacation payments depends on the nature of the vacation benefits. Since those cases that Petitioner has characterized as conflicting do not involve vacation payments arising out of an employee benefit plan, *Morash* does not present a legal conflict requiring this Court's review.[7]

(Continued from previous page)

to those of *Morash*. Just as *Fort Halifax* addressed Maine's requirement that its employers make severance payments, *Henning* addressed California's requirement that its employers make certain vacation payments. *Henning* and *Fort Halifax* are similar for purposes of ERISA's preemptive coverage because neither involves an employer-sponsored employee benefit plan.

6. The *Henning* court also addressed the validity of a Department of Labor regulation, 29 C.F.R. § 2510.3-1(b) (1987), that distinguishes plan-based vacation benefits from payroll practice vacation benefits. In discussing the Regulation's validity, the court drew a distinction between "wage compensation" that ERISA does not regulate, and "benefit compensation" that ERISA does regulate. 770 F.2d at 861-62. That distinction supports Respondent's position that the type of benefits determines whether there is preemption, and that *Morash* does not conflict with *Henning*.

7. There is a third case, *Erich v. GAF Corp.*, 110 N.J. 230, 540 A.2d 518 (1988), that Petitioner contends conflicts with *Morash*. Two factors, however, distinguish *Erich*. First, the opinion focused on the propriety of the employer's change of vacation benefits policy, not on whether the benefits were provided pursuant to a plan. Second, and most importantly, the court based its analysis and decision on *federal* law, and chose the appropriate standard of review from ERISA. Since *Erich* addresses a different issue, the employer's right to change its vacation benefits plan, and since its decision follows federal standards, it does not conflict with *Morash;* in fact, it is consistent with the *Morash* holding that ERISA controls.

B. Since The Morash Decision Stems From A Particular Application Of One State's Nonpayment Of Wages Statute, The Decision's Implications Are Limited.

The question whether ERISA preempts state law claims has arisen in two different contexts—those involving common law contract actions for vacation benefits and those involving application of state wages statutes to vacation benefits.[8] The issue in *Morash* is limited to preemption of a wages statute.

Petitioner has cited only two cases that address a state wages statute's application to vacation payments. The first case is *People v. Art Steel Co., Inc.*, 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986). *Art Steel* addresses the New York wages statute, section 198-c, that states:

> . . . any employer who is party to an agreement to pay or provide benefits or wage supplements [which includes vacation pay] to employees or to a third-party or fund for the benefit of employees and who fails [to make such payments] shall be guilty of a misdemeanor.

Consistent with *Morash*, in *Art Steel*, the New York criminal court found that ERISA preempts section 198-c in those cases that involve vacation benefits prescribed by

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8. The amici curiae brief indicates that other states are concerned about their nonpayment of wages statutes. Respondent again stresses that the *Morash* decision addresses only the Massachusetts statute and its application to a particular plan-based vacation pay claim. In addition, despite repeated references in the amicus brief to the importance of protecting wages, the *Morash* decision neither addressed nor implicated regular wage claims, claims for vacation pay during employment, or vacation benefits created by state law.

an employee benefit plan. 133 Misc. at 1005-07, 509 N.Y.S.2d at 718-19.

The second case is *California Hospital Ass'n v. Henning*, 770 F.2d 856 (9th Cir. 1985), *cert. denied*, 477 U.S. 904 (1986). *Henning* is the only case that Petitioner has identified as a conflicting decision involving a state wages statute. As the *Henning* opinion explains, however, both section 227.3 of the California Labor Code and California's use and interpretation of that statute are very different from those of Massachusetts. The California statute provides:

> [W]henever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, *all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy.* . . . (emphasis added)

As is discussed above, *supra* pp. 9-10, the California Supreme Court construed section 227.3 to mean that California requires that vacation entitlements vest as labor is rendered, and therefore employers must pay terminated employees such benefits as wages. 31 Cal.3d at 784, 183 Cal. Rptr. at 852, 647 P.2d at 128.

Thus California's statutory vacation pay requirement differs from Massachusetts' statutory enforcement of employers' programs or plans regarding vacation benefits. Whereas the California statute requires employers to make certain payments regardless of whether they have plans agreeing to them, just as the Maine statute addressed in *Fort Halifax* does, the Massachusetts Wages

Statute compels employers to make payments in *compliance with their own plans,* just as ERISA does.

In summary, the ruling of *Morash* is a limited one. It simply states that since the parties stipulated that accrued vacation payments were due at termination pursuant to an oral or written agreement, an employee benefit plan was involved. Given the existence of such a plan, ERISA preempted the Massachusetts Wages Statute.

II. BECAUSE THE MORASH DECISION IS CONSISTENT WITH FORT HALIFAX, THIS COURT NEED NOT REVIEW MORASH.

In 1987, this Court ruled that a Maine plant-closing statute requiring a one-time severance payment was not an employee benefit plan, and as a result not preempted by ERISA. *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211 (1987). Petitioner argues, quite mistakenly, that *Morash* is inconsistent with the *Fort Halifax* decision.

Petitioner's reliance on *Fort Halifax* is incorrect because the facts of that case are clearly distinguishable. Whereas the Maine statute applies when an employer *does not have a plan or agreement to provide a benefit to its employees,* 107 S.Ct. at 2217-18, the Massachusetts Wages Statute comes into play *only if an employer has a plan.* But for an employer's agreement to provide certain vacation benefits to employees who sever their employment relationship, the Commonwealth of Massachusetts could not prosecute under its Wages Statute.

Since preemption depends upon whether a law relates to any employee benefit *plan,* 107 S.Ct. at 2217, and since the Maine and Massachusetts statutes differ in that one

protects employees in the absence of a severance plan, whereas the other protects employees in the face of a vacation benefits plan, the *Morash* court's finding that ERISA preempts the Massachusetts Wages Statute is consistent with the principles of *Fort Halifax.*

III. BECAUSE LOWER COURT DETERMINATIONS OF WHETHER THE "GENERALLY APPLICABLE CRIMINAL LAWS" EXCEPTION TO ERISA'S PREEMPTION APPLIES TO STATE STATUTES ARE NOT CONFUSED, THIS COURT NEED NOT EXPLAIN THE EXCEPTION'S MEANING.

Although ERISA's preemption is express and broad, the preemption is subject to several narrow exceptions. Petitioner has argued that if ERISA would otherwise preempt the Massachusetts Wages Statute as it relates to vacation payments stemming from employee benefit plans, the statute is exempted from that preemption because it falls within ERISA's exception for "generally applicable criminal laws," 29 U.S.C. § 1144(b)(4). (Pet. at 26-29) The *Morash* court disagreed, however:

> Because our statute is limited to the non-payment of "wages" by an employer to an employee, including agreed-upon vacation payments which will often be funded from "employee benefit plans," prosecution under the statute is not saved from preemption by the exception for "generally applicable criminal laws."

(Pet. at A-31, 32)

As Petitioner, the Commonwealth has suggested that this Court should review the *Morash* ruling because there is "great confusion among the lower courts" about the meaning of the phrase "generally applicable criminal

laws." (Pet. at 26) Respondent submits that, in fact, through rulings that are legally consistent, lower court decisions tend to suggest understanding of the exception, and that Petitioner has hung its claim of "great confusion" on the single thread of a single inconsistent decision.

Again, the legal principles are consistent and clear: First, Congress has expressly instructed that ERISA shall preempt state laws that relate to employee benefit plans, 29 U.S.C. § 1144(a).[9] Second, this Court has strongly advised that ERISA's preemption is to be construed and applied broadly. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

Appreciative of those principles, several courts have considered the question of when the exception for "generally applicable criminal laws" applies. Since there normally is no issue over whether a state statute is criminal, the inquiries typically focus on whether a criminal statute is "generally applicable." In 1981, the Massachusetts Supreme Judicial Court explained its determination clearly:

> The § 1144(b)(4) exception from preemption for "generally applicable" State criminal laws appears

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9. ERISA's legislative history expresses Congress' expectation that the preemption should "foreclose the possibility that benefit plans would be subjected to conflicting and inconsistent state and local laws." 120 Cong. Rec. 29,993 (1974) (statements of Senator Williams). To achieve that goal, it was intended that ERISA would "apply in its broadest sense to all actions of state and local governments." *Id.* at 32,430. *See also, Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978).

> designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example. By virtue of § 1144(b)(4), a State is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan, simply because the theft involved such a plan. But by limiting the . . . exception to criminal laws of *general* applicability, Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans.

Commonwealth v. Federico, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377-78 (1981) (emphasis in original).

Several courts have adopted the reasoning of *Federico*. In 1983, the United States District Court for the Eastern District of New York recognized that "by limiting the exclusion from preemption to only those criminal laws of 'general' applicability, Congress manifested a purpose to supersede criminal laws directed specifically at employee benefit plans," and followed *Federico*. *Trustees of Sheet Metal Workers' Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 563 (E.D.N.Y. 1983). Like *Federico*, the *Aberdeen* decision distinguished "criminal laws applying in general terms to conduct such as larceny or embezzlement" from laws purposefully regulating or targeting benefit plans. *Id.*

Also in 1983, the United States District Court for the Northern District of Illinois cited *Federico* and ruled

that the Illinois Wage Payment Collection Act was not a generally applicable criminal law. *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337, 341 (N.D. Ill. 1983). In 1986, the Criminal Court of the City of New York followed *Federico* and *Aberdeen* to rule that the New York wages statute, Labor Law section 198-c, is not a generally applicable criminal law. *People v. Art Steel Co.*, 133 Misc.2d 1001, 1009, 509 N.Y.S.2d 715, 720 (1986).

Against that background, Petitioner has discussed one case, *Upholsterers' Int'l Union v. Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C.D. Ill. 1986) that found that a wages statute was a generally applicable criminal law. Respondent cannot deny that that decision is out of step with others. The fact, however, that two years ago one court erred regarding interpretation of an ERISA exception with which other courts have had little difficulty does not warrant this Court's review.[10]

Furthermore, whether a state's statute is a "generally applicable" criminal law depends on the language and application of that statute. Insofar as Congress has permitted this exception to ERISA's broadly preemptive purpose, it most likely intended to respect the states' traditional right to prevent general criminal activity. If, therefore, a state decides that its own statute is *not* a generally applicable criminal law, in support of federal preemption, there is no reason for this Court to substitute its judgment for that of the state court. The state court is in a better position to determine which of its state's laws are "generally applicable."

10. At the very end of its discussion, Petitioner refers to, but does not discuss, a decision of the Civil Court of the City of New York, *Goldstein v. Mangano*, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1978). (Pet. at 29) Since *Goldstein* was the decision of a city court, was issued prior to the reasoning and guidance of *Federico* and the other cases Respondent has discussed above, and has recently been rejected by a criminal court of the City of New York in *People v. Art Steel Co., Inc.*, 133 Misc.2d 1001, 1007-09, 509 N.Y.S.2d 715, 719-20 (1986), it adds little support to Petitioner's argument.

CONCLUSION

For the above-stated reasons, this Court should deny the Commonwealth of Massachusetts' Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court.

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